50 TIPS IN 60 MINUTES

31st Annual State Superintendent's Conference on Special Education & Pupil Services Leadership Issues

Wisconsin DPI
October 21, 2015

Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 36695
251.607.7377
JJWEsq@aol.com
www.specialresolutions.com

This fast-paced session will provide participants with 50 practical tips on all things legal, from A to Z, in the field of special education. Topics covered will range from child-find, evaluation, eligibility, IEP/placement, procedural safeguards, discipline and Section 504. At the end, a few "mental health/attitudinal" tips will be thrown in for good measure!

I. CHILD-FIND/IDENTIFICATION TIPS

1. **TRAIN** all school personnel to take the "Problem Solving Team" process seriously and to understand that the role of these Teams is not to "get a student into special ed."

- To prevent disproportionality/overrepresentation based upon race or ethnicity.
- To prevent over-identification of students in special education generally.
- To ensure that students are provided with appropriate instruction prior to consideration for special education services.

2. **TRAIN** all school personnel (including, *importantly*, regular education teachers and those who serve on Problem Solving Teams) on the overall legal requirements applicable to the identification and education of students with disabilities.

- Individuals with Disabilities Education Act (IDEA)
- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act of 1973 (Section 504)
- Family Educational Rights and Privacy Act (FERPA)
- No Child Left Behind (NCLB)/ESEA
- Relevant State Law Requirements that differ from Federal

3. **ENSURE** that if/when developing and implementing an RTI approach to child-find and identification, a parental request for an evaluation is not met with: "I'm sorry, but we can't do an evaluation right now because your child has not completed RTI."

Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RtI strategy. The use of RtI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provision of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RtI framework.

Letter to Ferrara, 60 IDELR 46 (OSEP 2012). While districts cannot use RTI as a reason for failing to evaluate a student, a Texas regulation advising districts to consider RTI before referring a student is not inconsistent with the IDEA's child-find requirement. While it is inconsistent with the IDEA for an LEA to wait until the completion of RTI activities before responding to a parent's request for an initial evaluation by either refusing to conduct it (because it does not suspect that the student has a disability) and providing written notice of the refusal or conducting it in accordance with IDEA's timelines, the Texas regulation does not prohibit a district or a child's parent from referring a child prior to completion of RTI. Rather, it merely states that RTI "should be considered" before referral. If a parent believes that RTI is being used to delay or deny an evaluation, the parent may seek redress through a due process complaint.

4. **STRESS** the importance and affirmative nature of IDEA's child-find requirements.

- ❖ Referral for an evaluation is required when there is "reason to suspect" or "reason to believe" that the student may be a child with a disability in need of special education.

Demarcus L. v. Board of Educ. of the City of Chicago, 63 IDELR 13 (N.D. Ill. 2014). District court did not err in finding that there was no child find violation. A parent seeking relief for a child find violation must show that the district 1) overlooked clear signs of disability and negligently failed to order an evaluation; and 2) had no rational justification for its decision not to evaluate. Here, the parent failed to meet either standard. While the child was rude and discourteous, had disrupted classroom activities and engaged in behaviors such as fighting and yelling when he did not get his way, there was no fault in the district's belief that it could manage the child's behaviors using classroom-level interventions. District personnel managed and de-escalated the child's behavior through the first semester of 2011 while he was in second grade and the district conducted an IDEA evaluation in late 2011, after it suspended him twice for disrupting classroom activities and learned of his subsequent psychiatric hospitalization.

Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278 (M.D. Pa. 2014). The parent's failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district's failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as "bullying;" she visited the school nurse on at least 54

occasions for injuries, hunger; anxiety or a need for "moral support;" the student's grades, which has been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This "mosaic of evidence" clearly portrayed a student who was in need of a special education evaluation.

5. WATCH OUT for "referral red flags."

So, in summary, what might it take for there to be a "reason to suspect" or "reason to believe" that a student is disabled and needs special education under either Section 504 or the IDEA? Based upon existing case law, I have developed a running checklist of referral red flags that courts/agencies could find, in combination, sufficient to constitute a "reason to suspect a disability" and a need for special education services that would trigger the IDEA's or 504's child-find duty.

Important Note: When referring to this checklist, it is very important to remember that not one of these triggers alone (or even several together) would necessarily be sufficient to trigger the child-find duty under Section 504 or IDEA. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered.

It is also important to note that it is more likely that the child-find duty to evaluate will be triggered under Section 504 before it would be under the IDEA because the definition of disability is much broader and all-encompassing than it is under IDEA. Under the IDEA, it is rare that a court would find it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns or need for special education services. However, OCR is likely to find the 504 duty to evaluate for a disability and need for accommodations/services has been triggered, even in the absence of any academic concerns.

Especially in an RTI world, look out for indicators in these areas and **"when there's debate, evaluate (and re-evaluate too)!"**

a. Academic Concerns in School

- Failing or noticeably declining grades
- Poor or noticeably declining progress on standardized assessments
- Student negatively "stands out" academically from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little academic progress or positive response to interventions
- Student is already on a 504 Plan and accommodations have provided little academic benefit

b. Behavioral Concerns in School

- Numerous or increasing disciplinary referrals for violations of the code of conduct
- Signs of depression, withdrawal, inattention

- Truancy problems, increased absences or skipping class
- Student negatively "stands out" behaviorally from his/her same-age peers
- Student has been in the Problem Solving/RtI process and a BIP and progress monitoring data indicate little behavioral progress or positive response to interventions
- Student is already has a 504 Plan or a BIP and accommodations have provided little behavioral benefit

c. Outside Information Provided

- Information that the child has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the child has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the child is taking medication
- Information that the child is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or services

d. Information from School Personnel

- Teacher/other service provider suggests a need for an evaluation under 504 or IDEA or suggests counseling, other services, etc.

e. Parent Request for an Evaluation

- Parent requests an evaluation and other listed items above are present

Sample cases:

Lauren G. v. West Chester Area Sch. Dist., 60 IDELR 4 (E.D. Pa. 2012). Clearly, the school district had reason to believe that the student had a disability and erred in finding the student ineligible for a Section 504 plan and, therefore, is responsible for partial reimbursement for the student's therapeutic residential placement. The denial of FAPE stemmed from the child study team's selective review of evaluation data. Although the team looked at academic records, student meetings and feedback from teachers, it did not consider information about his mental and emotional difficulties. Specifically, the district ignored the student's psychiatric diagnoses, her inpatient and outpatient psychiatric hospitalization, and the fact that she was cutting classes to see the guidance or crisis counselor once or twice per week. In addition, the district informed the parents that it found the student ineligible for a 504 Plan just one day after the guidance counselor requested additional information about the student. Because the student's depression and OCD substantially limited his learning, the district's failure to find him eligible for a 504 Plan amounted to a denial of FAPE.

Long v. District of Columbia, 56 IDELR 122, 2011 WL 1061172 (D. D.C. 2011). Where district did not evaluate student for three years and violated its child-find duty, case is

remanded to the hearing officer to determine appropriate compensatory education. In this case, the district's child find duty was triggered when a private psychologist diagnosed a learning disability in 2006. Contrary to the district's assertions and the hearing officer's findings, there was evidence that the district was aware of the evaluation in 2006 but did not conduct an evaluation until 2009. For instance, an IEP team member apologized for the district's delay in following through on the referral process that was "initiated in 2006" when the charter school, for which the district was the LEA, referred the student for the evaluation in 2006. In addition, the district's assertion that the student suffered no harm is rejected, where the IEP team determined that the student was eligible for services when it finally completed the evaluation in 2009. The district's argument that it was not on notice of the suspected SLD until the parent presented a copy of the 2006 evaluation at the 2009 IEP meeting is also rejected, as the district's child-find obligations are triggered "as soon as a child is identified as a potential candidate for services."

E.J. v. San Carlos Elem. Sch. Dist., 56 IDELR 159 (N.D. Cal. 2011). District did not fail to timely identify the student as eligible under IDEA. Rather, the district properly and timely responded to parental concerns by convening a student study team meeting when it learned that a private neuropsychologist had diagnosed the student with Asperger syndrome. In addition, the team made modifications to the student's educational program, including extended time for test taking, the use of relaxation techniques and the use of a sign if the student needed to take a break. Not only did the student complete the 5th grade with A's and B's, she performed well in the 6th grade as well. During the 7th grade, the student study team met twice, after she was diagnosed with anxiety and OCD and adopted additional modifications to instruction. In eighth grade, the district promptly referred her for a special education evaluation in response to her parents' request. Prior to that, the student's teachers had no reason to believe she needed special education services and the evidence supports the conclusion that her parents did not request referral prior to the team meeting in November 2008. Thus, the due process decision in favor of the district is affirmed.

Oxnard (CA) Elem. Sch. Dist., 56 IDELR 274 (OCR 2011). School district discriminated against a first-grader diagnosed with ADHD, a seizure disorder and a mood disorder by delaying his IDEA evaluation and failing to evaluate for Section 504 services. The district violated 504 by referring the student to its student support team before conducting an evaluation, even when there was reason to suspect a need for special education services. Where the district placed the child on a half-day schedule and later excluded him from summer school due to his disruptive behavior, coupled with the knowledge of the medical diagnoses, there was enough there to have suspected a need for special education services.

6. **REFRAIN** from diagnosing medical conditions or suggesting medication without the credentials for doing so.

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnosis of a particular medical condition without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to

what school personnel believe to be a disability. The 2004 IDEA Amendments now provide that the State Educational Agency shall prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the new Act notes further that nothing in this paragraph "shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services…."

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a student as disabled. But see, Barnes v. Gorman, 122 S. Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001)). Because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." [Note: The Third Circuit revised its position on damages for violations of the IDEA and aligned with other circuit courts in finding that money damages are not available for IDEA claims. See, Chambers v. School Dist. of Philadelphia Bd. of Educ., 53 IDELR 139, 587 F.3d 176 (3d Cir. 2009).

Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents' request and with their consent about a student's behavior that may aid medical professionals in making diagnosis.

II. EVALUATION/REEVALUATION TIPS

7. **EXERCISE** the right to conduct evaluations by professionals/experts of the school system's choosing for purposes of determining eligibility, particularly in potentially adversarial situations.

Independent Sch. Dist. No. 701 v. J.T., 2006 WL 517648, 45 IDELR 92 (D.C. Minn. 2006). Where district agreed to use former district's evaluation when it prepared IEP, when parent asked for IEE and was able to prove former district's evaluation was inappropriate, new district required to fund IEE.

Shelby S. v. Kathleen T., 45 IDELR 269 (5th Cir. 2006). School district has justifiable reasons for obtaining a medical evaluation of the student over her guardian's refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation.

M.T.V. v. DeKalb County Sch. Dist. , 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct reevaluation by expert of its choosing.

G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.

8. **SHARE** fully all relevant evaluative and other educational information about the child with the parents.

Amanda J. v. Clark County Sch. Dist., 160 F.3d 1106 (9th Cir. 2001). Because of the district's "egregious" procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

M.M. v. Lafayette Sch. Dist., 64 IDELR 31 (9th Cir. 2014). District committed a procedural violation that denied FAPE when it did not share over a year's worth of RTI data with the child's parents during the eligibility meeting, even though it does not use the RTI model for determining LD eligibility. The duty to share RTI data does not apply only when a district uses an RTI model to determine a student's IDEA eligibility. This procedural violation was not harmless where the other members of the IEP team were familiar with the RTI data but the parents were not and, therefore, did not have complete information about their child's needs. "Without the RTI data, the parents were struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully

benefitting from the [initial offer of special education services], and thus unable to properly advocate for changes to his IEP."

9. **REFRAIN** from suggesting to parents that they are responsible for obtaining educationally relevant evaluations, including medical evaluations for diagnostic and evaluative purposes.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

10. **CONDUCT** comprehensive evaluations and evaluate in all suspected areas of need, not just disability.

D.B. v. Bedford County Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer's finding, the student's services might well have changed had he been fully evaluated in *all areas of suspected disability*. "Although the [hearing officer] observed that [student] was promoted a grade every year…this token advancement documents, at best, a sad case of social promotion" where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.

Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6-year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district's failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student's learning.

11. **MAKE** appropriate and thorough decisions regarding the need to conduct reevaluations and presume that a reevaluation is needed rather than presuming that it is not, particularly where the student is not making expected progress.

- ❖ When there's debate, reevaluate!

12. **CONSIDER** results of independent educational evaluations that parents present.

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester County, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

13. **REMEMBER** that parents have the right to request an Independent Educational Evaluation at public expense (IEE) when they disagree with the evaluation completed by and/or obtained by the school system and respond appropriately to such requests.

P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR 46, 2010 WL 2926129 (W.D. N.C. 2010). Where parents obtained an IEE without waiting for the school district to respond and provide a list of approved evaluators, parents are not entitled to reimbursement for their IEE because they failed to follow IDEA's requirement for obtaining a publicly-funded IEE. In addition, the parents were not able to show that the district's response came too late and parents jumped the gun by obtaining and paying for an IEE eight days after mailing their request for an IEE. Although there was disagreement as to when the parents received the district's response that it would pay $800 for an IEE from its approved list of examiners, all of the asserted dates of receipt fell within the 60 days the district had to respond or request due process under North Carolina's statute of limitations.

14. **MAINTAIN** and update a district list of qualified independent evaluators and applicable criteria for independent evaluators.

B. v. Orleans Parish Sch. Dist., 64 IDELR 301 (E.D. La. 2015). The parents' noncompliance with the IEE guidelines the district provided justify the district's refusal to reimburse the parents for their IEE. A publicly funded IEE is subject to the same criteria that a district uses for its own evaluations. Because the district here applied the criteria set forth in the State Department's "Bulletin 1508," the IEE needed to follow those same requirements. When the district granted the request for an IEE, it informed the parents that the evaluation had to comply with Bulletin 1508 and told them how to access the criteria online. However, the psychologist who assessed the student failed to follow applicable criteria, and the district indicated 7 specific areas in which the IEE did not comply with the requirements for evaluations of SLD. Similarly, the district notified the parents of 6 deficiencies in the portion of the IEE that addressed the student's OT and 6 more in the area of PT needs. Indeed, the psychologist did not contact the district about

the identified areas of noncompliance despite being advised to do so. Thus, the ALJ's decision that the parents were not entitled to reimbursement is upheld.

M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR 213 (N.D. N.Y. 2013). As an initial matter, the parent does not have the right to an IEE at public expense, because she did not disagree with the district's evaluation. Rather, she requested an IEE because she was dissatisfied with the IEP proposed for her son. Even if she had the right to an IEE, however, she failed to show that the district's $1,800 cap on IEEs was unreasonable. Between July 14, 2010 and August 18, 2010, at least 6 public and private clinics in the parent's geographic area were willing to conduct an IEE for $1,800. Although the district was willing to exceed the $1,800 cap if the parent demonstrated the need for an exception, the parent's wish to use a particular neuropsychologist did not amount to "unique circumstances" that would warrant the excess cost. Parent's failure to contact any of the psychologists or neuropsychologists on the list of qualified evaluators supplied by the school district defeated her challenge to the $1,800 cap.

III. ELIGIBILITY TIPS

15. **REMEMBER** that actual "disability labels" should not matter—it's eligibility for services and the provision of FAPE that matter.

W.W. v. New York City Dept. of Educ., 63 IDELR 66 (S.D. N.Y. 2014). The failure to explicitly mention a diagnosis of dyslexia in the IEP goals for an LD student is not fatal to the IEP because the IEP goals were adequately designed to address the student's learning challenges, which include not only dyslexia, but also dyscalculia and dysgraphia.

Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4 (4th Cir. 2013) (unpublished). The district did not deny FAPE to a teenager with Down syndrome based on its failure to list auditory processing disorder as his secondary disability in his IEP. This is so, because the IEP addressed all of the student's needs, regardless of his classifications. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction and checked for comprehension. Thus, there is no reason to disturb the district court's decision that the student received FAPE.

G.I. v. Lewisville Indep. Sch. Dist., 61 IDELR 298 (E.D. Pa. 2013) (unpublished). Although the district did not label the autistic student with ADHD, the 6th grader with autism still received FAPE. The district's program addressed the child's difficulty of staying on task and paying attention through a variety of accommodations and by placing him in a 1:1 setting for instruction of new material and a 1:2 setting for reteaching. Given that the IEP was tailored to address the needs of the student, the absence of the ADHD label did not constitute a denial of FAPE.

J.D. v. Crown Point Sch. Corp., 58 IDELR 125 (N.D. Ind. 2012). Deaf student's receipt of FAPE was not contingent on his disability label. Rather, his IEP addressed his unique needs and conferred meaningful educational benefit, even though the IEPs did not contemplate whether the student also was SLD. Failing to properly label a student's disability in his IEP will not deprive him of FAPE, as long as the student receives an

appropriate education, his parents receive an opportunity to participate in the IEP process, and he is not deprived of educational benefits. Here, the district received extensive notice of the student's cognitive deficits from his teachers and parents, which served to ensure that the district crafted IEPs that were tailored to address those deficits. In addition, records showed that in response to teacher and parent concerns, the district developed IEP goals and appropriate benchmarks and provided services geared toward increasing the student's reading fluency. Though the district ultimately determined that the student was not eligible as SLD, it increased the special education services he received when the parents provided private evaluation results indicating that the student was dyslexic. Importantly, the student made steady progress with reading pursuant to the district's attention to his cognitive deficiencies. In addition, the increase in his standardized test scores from second to fourth grade proved that his IEPs likely conferred meaningful benefit.

R.C. v. Keller Indep. Sch. Dist., 61 IDELR 221 (N.D. Tex. 2013). Where the district developed IEPs that addressed all of the ED student's disability-related needs, regardless of whether the student met the criteria for autism or not, a violation of IDEA did not occur. The IDEA does not confer a specific right to be classified under a particular disability category. "The fact that [student] believes he was mislabeled does not automatically mean that he was denied FAPE." Although the parent argued that an "autism" label would have meant that the student was entitled to receive additional services under Texas law, the district provided most of those services.

16. **DO NOT LIMIT** the definition of "educational performance" to academic performance when determining whether there is a condition that adversely affects educational performance.

M.M. v. New York City Dept. of Educ., 63 IDELR 156 (S.D. N.Y. 2014). Student with anxiety and depression but good grades is a "child with a disability," as her emotional disturbance impacted her grades because she could not come to school as evidenced by the district's agreement to provide two months of home instruction to her. Not only did the student miss several weeks of classes during the fall semester, but she did not attend at all from November 2007 to January 2008. She also did not earn the minimum number of credits required to move on to the next grade. Because district erred in finding student ineligible for IDE services, parents may recover the cost of her residential placement.

Mr. I v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121, 480 F.3d 1 (1st Cir. 2007). In Maine, "educational performance" is more than just academics and there is nothing in IDEA or its legislative history that supports the conclusion that "educational performance" is limited only to performance that is graded. In addition, "adversely affects" does not have any qualifier such as "substantial," "significant," or "marked." Thus, district court's holding that *any* negative impact on educational performance is sufficient is upheld. Student with Asperger's Syndrome who generally had strong grades, had difficulty in "communication," which is an area of educational performance listed in Maine's law. That makes her eligible for special education services.

Board of Educ. of Montgomery County v. S.G., 47 IDELR 285, 230 Fed. Appx. 330 (4th Cir. 2007). 15-year-old student with schizophrenia is eligible for special education services because her emotional disturbance adversely affected her educational performance in a regular classroom. Therefore, school district must fund S.G.'s attendance at a therapeutic school.

C.B. v. Department of Educ. of the City of New York, 52 IDELR 121 (2d Cir. 2009). Though there is no dispute that the student has co-morbid bipolar disorder and ADHD, the conditions do not make her eligible as an OHI student because they do not adversely affect her educational performance. The student's grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the private school thereafter. Relevant evaluations indicate that she tested above grade-level and do not find that her educational performance has suffered. Thus, the evidence is insufficient to show that she has suffered an adverse impact on her educational performance.

Williamson County Bd. of Educ. v. C.K., 52 IDELR 40 (M.D. Tenn. 2009). Gifted student with ADHD should have been made eligible for special education services as Other Health Impaired. "Under the law, it is not enough that C. managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level. Each state 'must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.'"

G.D. v. Wissahickon Sch. Dist., 56 IDELR 294, 2011 WL 2411098 (E.D. Pa. 2011). School district's evaluation process was flawed when it found the child ineligible for IDEA services because IDEA eligibility does not turn on academic ability alone. Rather, the Third Circuit has held that a child's progress must be measured in light of his potential. The school psychologist's evaluation report focused solely on the child's superior academic performance and did not discuss the results of two private ADHD diagnoses, parent and teacher rating scales, and input from the kindergarten teacher. In addition, the evaluation report did not include the psychologist's own classroom observations of the student and the psychologist's statement to the parents that she "didn't do IEPs for students who have good skills" highlighted the flaws in the evaluation process. The district has an obligation to look beyond a child's cognitive potential or academic progress and address attentional issues and behaviors that a teacher has identified as impeding the student's progress. Thus, the district's evaluation was flawed and an award of compensatory education is warranted.

17. **REMEMBER** the third prong for determining eligibility: whether the student's condition adversely affects educational performance *to the degree that the student needs special education and related services.*

D.A. v. Meridian Joint Sch. Dist. No. 2, 62 IDELR 205 (D. Idaho 2014). Although Idaho law defines "educational performance" to include nonacademic skills such as daily life

activities, mobility, vocational skills, and social adaptation, student with autism is not eligible for services. This is so because he performed at least as well as his nondisabled peers in courses such as drama, personal finance, Web design, and broadcasting. In addition, the evidence showed that the student overcame his pragmatic and social difficulties to the extent necessary to succeed in the general education setting. Clearly, the student does not need special education to receive an educational benefit and, at most, requires related services that do not qualify as special education under Idaho law.

Chelsea D. v. Avon Grove Sch. Dist., 61 IDELR 161 (E.D. Pa. 2013). Even though there was evidence of a severe discrepancy between ability and achievement in math reasoning, the district did not violate IDEA in finding the 9th-grader ineligible for special education. Where the student had no need for specialized instruction, she was not a "child with a disability" under the IDEA. In addition to having one of the disabilities set forth in IDEA, the student must show that she needs specialized instruction because of that disability. Although the student had earned a D in math in eighth grade, those grades stemmed from her failure to complete homework. Her grades improved after she began receiving accommodations for her ADHD and, in 9th grade, she earned a final grade of B- in the general education math curriculum. Further, her scores on a statewide math assessment showed her overall math ability to be at the base-to-proficient level. Where she made solid progress in math without any modifications to the content, methodology, or delivery of instruction, the hearing officer's decision that she did not need specialized instruction for an SLD is upheld.

C.M. v. Department of Educ., 58 IDELR 151 (9th Cir. 2012) (unpublished). District court's decision that the student with CAPD and ADHD is not a child with a disability and eligible for services under the IDEA is upheld. Based upon the student's performance in her regular education classes, with accommodations and modifications, she was able to benefit from her general education classes without special education services. The parent's argument that the Read 180 program, pre-algebra course and math lab amounted to "specialized instruction" is rejected. Students who can benefit from general education classes with accommodations and modifications do not have a need for special education. The court agrees with the district court that substantial evidence supported the hearings officer's conclusion that the reading and math classes were not "special education" classes, but were regular education classes with small enrollments designed to provide additional support and were open to many types of students who needed additional help. In addition, the department evaluated the student in all areas of suspected disability and the student did not qualify for services under the category of SLD or OHI, since the department could meet the student's needs with a Section 504 plan.

Mowery v. Board of Educ. of the Sch. Dist. of Springfield R-12, 56 IDELR 126 (W.D. Mo. 2011). District's determination that student is not eligible because he is not in need of special education and related services to receive an educational benefit is upheld. Although a private psychiatrist diagnosed student with a pervasive developmental disorder, Asperger syndrome, generalized anxiety disorder, obsessive compulsive disorder, oppositional defiant disorder, these impairments did not adversely affect his

education, as the student performed reasonably well in his classes despite having missed 43 days of school in 4th grade. In addition to earning A's, B's and C's, he participated in a gifted program and scored at the 5th grade level on standardized tests. The student's behavior also improved when he changed medication and, while his teachers expressed some concern about personal and social development, the teachers still graded his performance as "satisfactory."

H.M. v. Haddon Heights Bd. of Educ., 57 IDELR 186, 2011 WL 4499253 (D. N.J. 2011). District did not err in finding that student was no longer eligible as an SLD student because she did not need special education services. The notion that the student's weakness in oral reading demonstrated LD in the area of reading fluency is rejected. According to the student's teachers, the student was able to read and comprehend what she read and the student's oral reading skills were average to above-average for a 5th grader. While one evaluation rated the student's oral reading skills at the 2nd grade level, the data as a whole, including her above-average grades, showed that she functioned at or near grade level. Thus, the student's weakness in oral reading fluency does not adversely impact her educational performance to the extent that she requires special education services.

18. DISTINGUISH between SED and BAD, but be careful!

Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist., 51 IDELR 149, 300 F. App'x 11 (2d Cir. 2008). Determination that student was not eligible as an SED student is affirmed. Student's inappropriate behavior fell short of qualifying him as SED, as an expert saw his drug use as the root of the student's problems in school. This conclusion is "more consistent with social maladjustment than with emotional disturbance." Parents did not produce enough evidence of an "accompanying emotional disturbance beyond the bad conduct."

Brendan K. v. Easton Area Sch. Dist., 47 IDELR 249, 2007 WL 1160377 (E.D. Pa. 2007). Evidence supports determination that student diagnosed with, among other things, ADHD is not eligible for special education services. Rather, "[t]eenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education."

Eschenasy v. New York City Dept. of Educ., 52 IDELR 66 (S.D. N.Y. 2009). Teenager diagnosed with mood disorder, conduct disorder, trichotillomania, borderline personality features and expressive language disorder should have been found eligible for special education services as an SED student. Clearly, the student exhibits inappropriate types of behavior or feelings under normal circumstances and has a generally pervasive mood of unhappiness or depression. Her symptoms clearly adversely affect her educational

performance, as she had failing grades, repeated expulsions and suspensions and a need for tutors and summer school. The school district's assertion that her inappropriate behavior is just bad behavior is rejected. While it is undisputed that the student repeatedly misbehaved in school by cutting class, taking drugs and stealing, she also engages in hair pulling and cutting herself, was diagnosed with a mood disorder, diagnosed with personality disorder and attempted to commit suicide. Thus, it is more likely than not that all of the student's problems, not just her misconduct, underlie her erratic grades, expulsions and need for tutoring and summer school. Thus, parents are entitled to reimbursement for placement at the Elan School, which was appropriate for her.

Hansen v. Republic R-III Sch. Dist., 56 IDELR 2, 632 F.3d 1024 (8th Cir. 2011). Ninth grader diagnosed with conduct disorder, bipolar disorder and ADHD is eligible as emotionally disturbed and OHI. Where the district chose not to put on any evidence at the hearing and the hearing panel made no findings, the court is free to review the administrative record and draw its own conclusions. This student had multiple disciplinary referrals over the previous four years for threatening students and teachers, fighting with other students and disrespecting teachers and peers. In addition, he struggled to pass his classes and failed a standardized test required to advance to seventh grade. He also exhibited hyperactive, impulsive and inattentive behavior as a result of his ADHD and these behaviors interfered with learning. "Although [the district] correctly states that a diagnosis of ADHD alone does not entitle [the student] to special education services, it fails to cite any evidence in the record supporting the conclusion that ADHD does not adversely affect [the student's] educational performance."

19. **DON'T** rely solely on medical diagnoses or recommendations for determining eligibility!

Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7th Cir. 2010). Where the ALJ's decision that the student continued to be eligible for special education under the IDEA focused solely on the student's need for adapted PE, the district court's decision affirming it is reversed. The ALJ's finding that the student's educational performance *could* be affected if he experienced pain or fatigue at school is "an incorrect formulation of the [eligibility] test." "It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does*." The evidence showed that the student's physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student's actual performance. In contrast, the student's PE teacher testified that he successfully participated in PE with modifications. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team" and while the team was required to consider the physician's opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student's need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.

S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D. Pa. 2008). Although the student was diagnosed with ADHD in the second grade, he earned As and Bs throughout elementary school. Though his grades slipped when he entered middle school, his teachers testified that he was attentive in class and performed well on quizzes and tests and that his poor performance stemmed from a lack of motivation rather than ADHD. Importantly, the court observed that the district devised strategies to help the student, which included the use of progress reports, an agenda book, and parent conferences.

Strock v. Independent Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. "Children having ADHD who graduate with no special education or any §504 accommodation are commonplace." The fact that the student was required to take remedial courses when beginning at the community college is "neither unusual or evidence of 'unsuccessful transition,' an entirely undefined term."

P.R. v. Woodmore Local Sch. Dist., 46 IDELR 134 (N.D. Ohio 2006). Student diagnosed with ADHD is not eligible as a student with a disability or OHI under IDEA. Student's doctor based her conclusions that student was OHI on the mother's observations and never interviewed any of the student's teachers, the student's guidance counselor, or any of the school's special education personnel. District personnel's determination that his difficulties in school were no different than those of many boys in their junior year of high school is upheld.

IV. IEP DEVELOPMENT TIPS

20. **REFRAIN** from action that appears to reflect a "predetermination of placement" or, in other words, appears to deny parental input into educational decision-making.

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it may very well lead to a finding of a denial of a free appropriate public education (FAPE). "Predetermination of placement" would include action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Being prepared for an IEP meeting or bringing draft IEPs, however, is not prohibited. Denial of parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc.

The 2004 IDEA Amendments address such procedural violations as follows:

> A decision made by a hearing officer "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE; 2)

> **significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child**; or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements.

R.L. v. Miami-Dade Co. Sch. Bd., 63 IDELR 182, 757 F.3d 1173 (11th Cir. 2014). To avoid a finding of predetermination of placement, a school district must show that it came to the IEP meeting with an open mind and that it was "receptive and responsive" to the parents' position at all stages. While some district team members seemed ready to discuss a small setting within the public high school as requested by the parents, the LEA Representative running the meeting "cut this conversation short" and told the parents that they would have to pursue mediation if they disagreed with the district's placement offer at the Senior High School. "This absolute dismissal of the parents' views falls short of what the IDEA demands from states charged with educating children with special needs."

P.C. v. Milford Exempted Village Schs., 60 IDELR 129 (S.D. Oh. 2013). District predetermined placement prior to the IEP meeting and, therefore, denied FAPE to the student. The district's preplanning notes show that its staff members were "firmly wedded" to a decision to withdraw the student from a private Lindamood-Bell program and return him to his home school to receive reading services. Most troubling was the student's teacher's testimony that the district was prepared to "go the whole distance this year" and force the parents into due process. Clearly, school officials went beyond merely forming opinions and, instead, became impermissibly and "deeply wedded" to a single course of action that the student not continue at the private school. In addition, they made their decision before determining what reading methodology would be used in the public school program and failed to discuss that issue with the parents. In this case, the type of methodology used could mean the difference in whether the student obtained educational benefit and, therefore, it was essential for the parents to participate in a conversation about it.

Berry v. Las Virgenes Unif. Sch. Dist., 54 IDELR 73 (9th Cir. 2010) (unpublished). District court's determination that district personnel predetermined placement is affirmed. Based upon the assistant superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school, the district court had found that the district determined the student's placement prior to the meeting.

G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation as long as it is made clear to the parents that drafts are presented for discussion purposes only.

Spielberg v. Henrico County, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act.

21. **PREPARE** adequately for IEP meetings, while avoiding predetermination.

Sand v. Milwaukee Pub. Schs., 46 IDELR 161 (E.D. Wis. 2006). The IDEA does not bar professionals from preparing for an IEP meeting and the fact that IEP team members spoke in preparation for the meeting did not deny the parents meaningful participation in the process.

IDEA Regulations: A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(3).

See also, N.L. v. Knox County Schools, 315 F.3d 688, 38 IDELR 62 (6th Cir. 2003) (the right of parental participation is ***not*** violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made) and Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115 (9th Cir. 2003); Burilovich v. Board of Educ., 208 F.3d 560 (6th Cir. 2000); and Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253, 19 IDELR 259 (E.D. Va. 1992) (school officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind).

22. **BE SURE** to act reasonably in response to parental requests to reschedule IEP meetings, particularly if the request to reschedule is for legitimate reasons.

Doug C. v. Hawaii Dept. of Educ., 61 IDELR 91, 720 F.3d 1038 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than deciding it could not disrupt the schedules of other team members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

23. **MAKE** IEP recommendations/decisions based upon the *individual needs of the child*.

LeConte, 211 EHLR 146 (OSEP 1979). Trained personnel "without regard to the availability of services" must write the IEP.

Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because District had, at that point, pre-decided the student's program and services. Thus, District's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that District had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

A.M v. Fairbanks North Star Borough Sch. Dist., 46 IDELR 191 (D. Alaska 2006). Where district coordinator for intensive preschool services told parents that a full day intensive program "was not developmentally appropriate" for preschoolers, with or without autism, this was not considered a "blanket policy" because there was testimony that if a full-day program had been deemed necessary by the IEP Team, it could have been implemented. The parents withdrew the autistic student from the public school program before IEP discussions could be completed.

T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district required to fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services, not the child' needs.

24. **USE** a proper process for determining the Least Restrictive Environment (LRE).

Courts and federal agencies are clear that IEPs and/or other relevant documentation should clearly and specifically document options considered on the continuum of alternative placements and why less restrictive options were rejected. This rationale must be clearly and appropriately stated.

Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated, 967 F.2d 470 (11th Cir. 1992). The IEP did not reflect sufficient consideration of less restrictive options than self-contained classroom.

St. Louis Co. Special Sch. Dist., 352 EHLR 156 (OCR 1986). Failure to state in IEPs why students could not be educated in the regular education environment with the use of supplementary aids and services denied them a free appropriate public education.

Brazo Sport Indep. Sch. Dist., 352 EHLR 531 (OCR 1987). Placement at separate facility was not justified and IEPs of all students should bear evidence of individual consideration of ability to benefit from regular education, not identical language for all

students in the separate facility.

25. **AVOID** being overly specific and including unnecessary details or "promises" in IEPs.

Virginia Dept. of Educ., 257 EHLR 658 (OCR 1985). IEPs are not expected to be so detailed as to be substitutes for lesson plans.

Paoella v. District of Columbia, 46 IDELR 271 (D.C. Cir. 2006). There is no requirement that the student's precise daily schedule be developed when determining an appropriate placement

Letter to Hall, 21 IDELR 58 (OSERS 1994). Part B does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student's IEP.

Lachman v. Illinois St. Bd. of Educ., 852 F.2d 290 (7th Cir. 1988). Parents, no matter how well-motivated, do not have the right to choose a particular methodology to be used.

Kling v. Mentor Pub. Sch. Dist., 136 F.Supp.2d 744 (N.D. Ohio 2001). Interscholastic sports or other extracurricular activities may be related services under the IDEA, even though not expressly included within the definition of "recreation." District ordered to revise student's IEP to contain an interscholastic sports component and to place him on the high school track and cross country teams, even though district contended it would risk sanctions from the state athletic association because the 19-year old hearing impaired student with CP was too old. The local and state hearing officers had ruled that it was necessary for the student to participate for the development of his communication skills and to address his social and psychological needs.

26. **ENSURE** proper attendance of required school personnel at IEP meetings and **ALLOW** afford parent invitees the opportunity to participate.

Under the IDEA, the public agency shall ensure that the IEP team for each child with a disability includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child.

The 2004 IDEA now provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

Arlington Cent. Sch. Dist. v. D.K. and K.K., 37 IDELR 277 (S.D. N.Y. 2002). The absence of a general education teacher at an IEP meeting for LD student denied him FAPE and supported award of tuition reimbursement for private placement. The presence of the teacher at the meeting might have illuminated the extent to which visual instruction was offered as a part of the district's mainstream curriculum and the likelihood that he could ever be integrated successfully into it general education program.

M.L. v. Federal Way Sch. Dist., 387 F.3d 1101 (9th Cir. 2004). The failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually impaired student was sufficient to find a denial of FAPE. The District's omission was a "critical structural defect" because there was a possibility of placement in an integrated classroom and the IEP recommended might have been different had the general education teacher been involved. When the general education teacher was unable to attend, District should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding curriculum and environment there.

27. ADDRESS behavioral strategies/interventions when appropriate.

If a student has behavioral issues that are disruptive to that student's education or that of others, then the IEP team is required to address positive behavioral strategies and interventions for that student. needs a behavior management program, it should be

discussed as a support service or intervention at the IEP meeting. The IDEA requires that any time a student exhibits behavior that impedes his or her learning or that of others, the IEP Team must consider appropriate strategies, including positive behavioral interventions, strategies and supports to address the behavior.

28. **INCLUDE** appropriate measurable goals in IEPs that are linked to present levels of performance and identified challenges.

Quite often, IEPs are attacked because of the lack of measurability of the annual goals (and short-term objectives/benchmarks, if appropriate). School staff should be trained to write appropriate and measurable annual goals that are individualized for the student.

Jefferson Co. Bd. of Educ. v. Lolita S., 64 IDELR 34 (11th Cir. 2014) (unpublished). District court's decision that the school district's use of "stock" goals and services with respect to reading and postsecondary transition planning constituted a denial of FAPE is upheld. Given that the LD teenager was reading at a first-grade level when he entered the 9th grade, a reading goal based on the state standard for 9th-graders failed to address the student's unique needs. Clearly, the IEP team had no evidence that the student's reading comprehension had increased by 8 grade levels since the prior school year. Nor did the district offer any services to address the gap between the student's performance and 9th grade standards. In addition, the student's name had been handwritten on several pages of the IEP above the name of another student, which had been crossed out. This was an "apparent use of boilerplate IEPs," which was to blame for the inappropriate goal. In addition, the district failed to conduct transition assessments and, instead, developed a transition plan with a goal calling for the student to participate in postsecondary education, which did not account for his placement on an occupational diploma track.

R.B. v. New York City Dept. of Educ., 63 IDELR 74 (S.D. N.Y. 2014). Because of space limitations on the district's IEP form, the IEP team was not able to include details in the field designated as "annual goals." However, the team used the "short-term objectives" field to expand upon each goal. Although the annual goals in the IEP were "short and broadly worded," the IEP contained detailed and objective standards that allowed for progress measurement on a short and long-term basis. For example, the student's reading comprehension skills could be measured, in the short term, by whether he is able to answer certain questions about a text at a sufficient rate of accuracy as observed and tested by his teacher. Because all of the IEP objectives were detailed, measureable and tailored to the needs of the student, the lack of detail in the goals themselves did not result in a denial of FAPE. In addition, the lack of baseline data in the goals did not amount to a procedural violation because they were stated in absolute terms that the district could measure without a baseline.

V. IEP IMPLEMENTATION TIPS

29. **REMEMBER** to inform all service providers of any responsibility they have to implement the IEP and document this process.

30. **ENGAGE** in continuous progress monitoring on IEP goals and revise IEPs when expected progress is not being made or goals have been achieved early in the year and **CONVENE** IEP teams when data reflects inadequate progress.

VI. PROCEDURAL SAFEGUARDS TIPS

31. **PROVIDE** parents with a copy of their IDEA rights at least once per school year.

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4th Cir. 2001). Parents entitled to reimbursement for Lovaas program due to district's repeated failure to notify them of their right to a due process hearing. Where the failure to comply with IDEA's notice requirements led to a finding of denial of FAPE, court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program.

32. **GIVE** prior written notice with respect to any proposal or refusal to initiate or change the identification, evaluation, placement or provision of FAPE to a child with a disability.

Letter to Chandler, 112 LRP 27623 (OSEP 2012). Prior written notice (PWN) of a proposal or refusal to take action regarding identification, evaluation, placement or the provision of FAPE to a student must be given after an IEP team meeting, but before implementing the action. The regulations obligate a district to give PWN, however, regardless of whether or not the proposal or refusal is made during an IEP meeting, and it must be provided "a reasonable time" before the district implements the action in order to allow parents time to thoroughly deliberate on the change and respond before the district implements it. However, sending PWN before the IEP team meeting could suggest that the district's proposal or refusal was predetermined. Most districts send it to the parents after the meeting with a copy of the IEP. PWN is not required where a child is simply moving from elementary school to middle school as part of the normal progression that all students follow and where the child's program will be substantially and materially similar to their elementary school program. However, there might be occasions when PWN would be required if, for example, the child would not be attending the middle school he/she would normally attend if not disabled.

K.A. v. Fulton Co. Sch. Dist., 62 IDELR 161, 741 F.3d 1195 (11th Cir. 2013). Parent consent is not required prior to amending an IEP and changing a student's placement. Where a change of placement was proposed, the district was not required to request a hearing to implement the change. Rather, the IDEA requires a district, when proposing to amend an IEP, to provide parents: 1) prior written notice explaining what is proposed and why; 2) an opportunity to review the child's records; and 3) a full explanation of their rights. While the district here did not issue proper notice before the IEP meeting, there is no evidence that they were prejudiced by the defective notice. These parents fully participated in the IEP process having received notice of the proposed amendment a month prior to the IEP meeting, an opportunity to observe the new school, and a chance to review IEP team meeting minutes, educational records, and a document describing the procedural safeguards. There is no support for the parents' argument that a district, not

parents, must file for due process before an amendment to an IEP can be made over parents' objections. Reading in such a requirement would be inconsistent with other provisions of the IDEA.

33. **REMEMBER** that parents are entitled to an explanation of their procedural safeguards, but this does not mean that the explanation be provided immediately or during an IEP meeting.

VII. DISCIPLINE TIPS

34. **MAINTAIN** clear and compliant discipline procedures applicable to students with disabilities (under IDEA and 504) and adequately **TRAIN** disciplinarians on the procedures.

First and foremost and with respect to discipline, school districts should have clear procedures in place that direct school disciplinarians as to how to handle disciplinary infractions committed by students with disabilities. These should be as clear and concise as possible, so that there is not a lot of room for discretion in terms of the actions that are to be taken.

Assuming good procedures are in place, school disciplinarians must be trained with respect to those procedures. The failure to train can not only leave the disciplinarian in potential legal trouble, but has the strong potential for landing the entire school district in legal hot water.

Under 42 U.S.C. § 1983, there is a good deal of judicial authority that a school district/governmental entity can be held liable for damages if there is a "custom or policy" on the part of the school district of failing to ensure that school disciplinarians are trained properly to address disciplinary infractions committed by students with disabilities. In addition, there is significant judicial authority to support money damages remedies under Section 504/the Americans with Disabilities Act for intentional discrimination, "deliberate indifference to" or "reckless disregard for" discriminatory activity in the context of discipline of students with disabilities.

35. **AVOID** making unilateral "changes in placement" through the use of suspension or other removal for disciplinary reasons.

Suspensions over ten (10) days at a time and, generally, suspensions for more than ten (10) days cumulatively are considered to constitute a "change in placement" for a student with a disability. The IDEA requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student's IEP Team; (2) the IEP Team must plan a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP Team must determine what services are to be provided to the child, for any removal period beyond ten (10) days in a school year, in order that the child may continue to participate in the general curriculum

and advance toward achieving his/her IEP goals. Local school districts typically incorporate protections in their procedures so that illegal "changes in placement" do not occur.

School personnel must also keep in mind that action taken that might not be officially **called** a "short-term suspension" still may be counted toward the 10-day change in placement analysis.

36. **DEVELOP** alternatives to suspension that do not constitute a "change of placement," including ISS.

In the commentary to the 2006 regulations, US DOE also reiterated its "long term policy" that an in-school suspension would not be considered a part of the days of suspension toward a change in placement "as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement." 71 Fed. Reg. 46715.

37. **BE CAREFUL** when considering whether transportation is a "related service" for a student with a disability. It will be important in the area of discipline.

In the commentary issued with the 2006 regulations, the U.S. Department of Education commented that "[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation were a part of the child's IEP, a bus suspension would be treated as a suspension…unless the public agency provides the bus service in some other way." US DOE goes on to note that where the bus transportation is not a part of the child's IEP, it is not a suspension. "In those cases, the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child." 71 Fed. Reg. 46715.

Letter to Sarzynski, 59 IDELR 141 (OSEP 2012). A bus suspension must be treated as a disciplinary removal and all of the IDEA's discipline procedures applicable to children with disabilities apply if transportation is listed on the IEP. If a student is suspended from transportation included in the IEP for more than 10 consecutive school days, that suspension constitutes a change of placement. Such a change of placement triggers the requirement for a manifestation determination. The fact that a family member voluntarily transports the student to and from school does not change the analysis. "Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child's parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service."

38. **LOOK OUT** for those regular education students who can claim the district *should have known* the student was a student with a disability prior to a long-term suspension/expulsion.

The IDEA contemplates the ability of regular education students to assert IDEA's protections where there is knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [request for initial evaluation]; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

Importantly, an LEA shall not be deemed to have knowledge that the child is a child with a disability if the parent has not allowed an evaluation or has refused services or the child has been evaluated and it was determined that the child was not a child with a disability. § 615(k)(5)(A)-(C).

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a student for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a referral to an outside mental health agency for an evaluation.

39. **USE** the 45-day "special circumstances" removal provision correctly.

The 45-day "special circumstance" removal provision in the IDEA is a commonly misunderstood one. Not only do many educators incorrectly interpret the 45-day removal provision as an absolute bar to what can be done, there is much misinterpretation of the circumstances to which it is to be applied.

With respect to certain dangerous students, the IDEA provides that:

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury on another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

20 U.S.C. § 1415(k)(1)(G).

Perhaps the most common mistake that is made lies within a common misunderstanding that when a student is involved in one of the "special circumstances" (weapon, drug or serious bodily injury), the only action that the school district can take is removal of that student to an alternative setting for up to 45 school days. This is clearly not the case, however. This provision of the law was intended to provide school personnel, in cases involving these special circumstances, up to 45 school days to appropriately address the infraction that occurred. In the meantime, a *unilateral* removal, without regard to manifestation, can be made. However, an IEP Team can convene during that time and propose a more permanent change of placement via the IEP Team process. The 45-day removal provision, therefore, imposes a limitation upon what an *individual disciplinarian* can do alone, but does not limit what an *IEP Team* can determine is appropriate.

Another common mistake made is with respect to an over-interpretation of the special circumstances to which the 45-day removal provision applies. Specifically, the definition of "serious bodily injury" under the IDEA references the definition contained in 18 U.S.C. § 1365(3)(h). There, the term "serious bodily injury" means bodily injury which involves: (a) a **substantial risk of death**; (b) **extreme** physical pain; (c) **protracted and obvious disfigurement**; or (d) **protracted loss or impairment** of the function of a bodily member, organ, or mental faculty. While this language may be somewhat unclear, school personnel should interpret this provision to include only the worst of situations that clearly fall within the restrictive definition. When there is serious question, the school should convene an IEP Team meeting and properly seek a change of placement for the student via the IEP Team process.

VIII. SECTION 504/ADA TIPS

40. **HAVE** Section 504 procedures in place and train school personnel on them.

Section 504 is misunderstood in terms of its application, its scope and its requirements.

In addition to ensuring that your Section 504 procedures are compliant with ADAAA, be sure to train all school personnel so that they understand the legal requirements of Section 504 as they relate to the education of children with disabilities.

41. **UNDERSTAND** that a student can be found to be "disabled" under Section 504 but not in need of a 504 Plan because his/her educational needs are met as adequately as the educational needs of nondisabled students. That child would be protected from discrimination but not necessarily in need of services.

42. **REMEMBER** that there are special rules of discipline applicable to students who are disabled only under Section 504.

Essentially, the bulk of the IDEA rules for disciplining students with disabilities have their "roots" in Section 504. This is so because Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. Thus, in terms of discipline, the general notion is that students with disabilities should not be deprived of educational services if the conduct for which they are being disciplined is "based upon" (a/k/a :a manifestation of") their disabilities. For the most part, the Office for Civil Rights (OCR) applies the same rules of discipline for students under Section 504 that exist for those students who are also disabled under the IDEA, particularly the requirement for making manifestation determinations when a disciplinary change of placement occurs.

43. **AVOID** exclusions of otherwise qualified disabled students from extracurricular and nonacademic activities, including athletics. Under Section 504, disabled students must be provided an equal opportunity to participate in extracurricular activities. 34 CFR 104.37(a)(1). However, as a general rule, such students must still comply with the behavioral, academic and performance standards of non-disabled students.

S.S. v. Whitesboro Cent. Sch. Dist., 58 IDELR 99 (N.D. N.Y. 2012). Parents' ADA and 504 damages claims on behalf of their daughter are dismissed, as the parents' request that the student be allowed to leave the pool during swim practices and competitions to calm her nerves whenever she suffered a panic attack is unreasonable. The parents' allegation that the district should have allowed their daughter to leave the pool for intermediate periods of time, and on unannounced occasions, without being dismissed from the team is rejected. "There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions." The ability to enter and stay in the pool is an essential requirement of being a swim team member and allowing the student to do otherwise would have fundamentally altered the nature of the swim team program.

Mowery v. Logan Co. Bd. of Educ., 58 IDELR 192 (S.D. W.Va. 2012). Homebound high school student with a hereditary metabolic disorder stated valid claims for disability discrimination and disparate treatment under Section 1983, 504 and ADA based upon the district's refusal to allow him to attend a senior class dance and other events because he was "too sick" to attend school. Based upon the allegation that he was often told, "if you're too sick to come to school, you're too sick to attend these events," it appeared that

the district treated him differently than other high schoolers on the basis of disability. In addition, student's claims dating back to his freshman year may proceed, because the student's alleged exclusion from senior class events could be viewed as part of a pattern of exclusion for discrimination and Section 1983 purposes.

Dear Colleague Letter, 60 IDELR 167 (OCR 2013). Because extracurricular athletics offer benefits such as socialization, fitness, and teamwork and leadership skills, districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in athletic programs. Districts should not act on the basis of generalizations and stereotypes about a particular disability. While students with disabilities do not have a right to join a particular team or play in every game, decisions about participation must be based on the same nondiscriminatory criteria applied to all prospective players. In addition, districts have the obligation to offer reasonable modifications so that students with disabilities may participate. If a particular modification is necessary, the district must offer it unless doing so would fundamentally alter the nature of the activity or give the student with a disability an unfair advantage. For example, using a visual cue to signal the start of the 200-meter dash would not fundamentally alter a track meet or give a student with a hearing impairment an unfair advantage over other runners. If a district does determine that a requested modification is unreasonable, it must consider whether the student could participate with a different modification or accommodation. While some students might be unable to participate in traditional athletic activities, even with modifications and supports, districts should offer athletic opportunities that are separate or different from those offered to nondisabled students in these instances. Such opportunities might include disability-specific team sports, such as wheelchair basketball, or teams that allow students with disabilities to play alongside nondisabled peers. Districts should be flexible and creative when developing alternative programs for students with disabilities.

44. **BE AWARE** that developing a health plan/nursing care plan may not suffice, by itself, for purposes of determining disability and providing services under Section 504.

North Royalton (OH) City Sch. Dist., 52 IDELR 203 (OCR 2009). School district denied Section 504 eligibility to a student with an anxiety disorder and life-threatening peanut allergies in part because the student's disability based needs were being adequately met by his health care plan. OCR concluded that the district's actions were in violation of Section 504 as health care plans are mitigating measures which school districts cannot consider in making their Section 504 eligibility determinations.

See also, Memphis (MI) Community Sch., 54 IDELR 61 (OCR 2009).

45. **REMEMBER** that "learning" is not the only "major life activity" to consider when determining whether a student is disabled under Section 504.

Oxnard (CA) Union High Sch. Dist., 55 IDELR 21 (OCR 2009). School district denied Section 504 eligibility to a student with a gastrointestinal disorder due to student earning passing grades. The student had missed 35 school days during the previous school year

as a result of the gastrointestinal disorder. The evaluation data indicated that as a result of the medical condition the student required accommodations such as excusal of tardiness and a reasonable period to make up missed assignments. OCR concluded that the district had erred by failing to consider other "major life impairments" other than learning in making its eligibility determination. OCR noted that major life activities for purposes of Section 504 include major bodily functions such as digestive and bowel functions.

See also, Memphis (MI) Community Sch., 54 IDELR 61 (OCR 2009).

See also, North Royalton (OH) City Sch. Dist., 52 IDELR 203 (OCR 2009).

46. **RECOGNIZE** that bullying of a student with a disability could constitute a form of discrimination—disability harassment—under Section 504 and schools are responsible for maintaining adequate procedures to address it. Also remember that bullying can impact on FAPE.

T.K. v. New York City Dept. of Educ., 63 IDELR 256 (E.D. N.Y. 2014). School district's response to peer bullying was inadequate where the district failed to address the issue in the disabled child's IEP or BIP. A district denies FAPE where it is deliberately indifferent to or fails to take reasonable steps to prevent bullying that substantially restricts the educational opportunities of the disabled child. If an IEP team has a legitimate concern that bullying will significantly restrict a child's education, it must consider evidence of bullying and include an anti-bullying program in the student's IEP, which was not done in this case. Here, the parents tried to discuss bullying during a June 2008 IEP meeting but were told by district members of the team that it was not an appropriate topic for discussion. Further, the IEP focused on changing behaviors that made the child susceptible to bullying rather than to ensure that peer harassment did not significantly impede her education. It was clear that the bullying interfered with the child's education, where she began bringing dolls to class for comfort, she gained 13 pounds and had 46 absences or tardies in one school year. Further, her special education itinerant collaborative teachers testified that classmates treated the child like a "pariah" and laughed at her for trying to participate in class. Thus, the district's inadequate response, coupled with the impact on the child's learning denied FAPE and entitled her parents to recover the cost of the child's private schooling.

Dear Colleague Letter, 64 IDELR 115 (OCR 2014). If an alleged victim of bullying is receiving services under Section 504 or the IDEA, the school's response to bullying allegations should include determining whether the bullying impacted the student's receipt of FAPE and, if so, convening the student's IEP or 504 team to address that impact. The obligation to address a bullying victim's ongoing ability to receive FAPE exists regardless of whether or not the student is being bullied based on a disability. In addition, it exists whether the student is receiving services under the IDEA or under Section 504. Changes that might trigger the obligation to convene the team and amend a student's IEP or 504 plan might include a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral outbursts, or a

rise in missed classes or sessions of Section 504 services. "Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: 1) the student's educational needs have changed; 2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and 3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly."

Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013). Consistent with prior DCL's published by the Department, bullying of a student with a disability that results in the student's failure to receive meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. Whether or not the bullying is related to the student's disability, any bullying of a student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA. Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his/her IEP, and the school should, as part of its appropriate response to bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If this is the case, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's needs and revise the IEP accordingly. The Team should exercise caution, however, when considering a change of placement or location of services and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. Certain changes to the educational program (e.g., placement in a more restrictive "protected" setting to avoid bullying) may constitute a denial or the IDEA's requirement to provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. In addition, if the bully is a student with a disability, the IEP Team should review that student's IEP to determine if additional supports and services are needed to address the bullying behavior. (Attached to this DCL is an enclosure entitled "Effective Evidence-based Practices for Preventing and Addressing Bullying").

Ten and one-half years after an initial Dear Colleague Letter in 2000, OCR issued another Dear Colleague Letter, 55 IDELR 174 (OCR 2010). This letter was designed to remind educational agencies that some incidents of bullying may also constitute disability harassment or other forms of discrimination under federal law and will require a response that goes beyond a school district's usual approach to peer teasing, taunting, or hazing. According to OCR, districts must now identify whether a reported incident, no matter how it is labeled, amounts to unlawful discrimination and, if so, respond in a manner that accords with Section 504, Title II, Title VI (which prohibits discrimination on the basis of race, color, or national origin), or Title IX (which prohibits gender discrimination).

IX. MENTAL HEALTH/ATTITUDINAL TIPS

47. **USE** a "facilitated" approach in all meetings and **REMEMBER** that relationships are important!

48. **AVOID** the temptation to unleash your inner attorney.

49. **REMEMBER** to "Just Breathe"!

As human beings, we are inclined to defend ourselves and respond to everything! In many situations, it is prudent to sit back, breathe and decide that no response may be the best response.

50. **ACCEPT** it: "No Good Deed Goes Unpunished."

There will be times that no matter how often you accede to parental demands, litigation will be initiated in any event, particularly when the school system says "no" for the first time. Remember, though, it can be dangerous to accede to parental demands, particularly if what they are asking be done is not appropriate for the student or is actually illegal.

Goleta Union Elem. Sch. Dist. v. Ordway, 38 IDELR 64 (C.D. Cal. 2002). The district Director of Student Services is liable under Section 1983 for failing to investigate the appropriateness of a junior high school placement for a student with SLD before unilaterally deciding, at the request of the parent, to transfer him there.